

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* JEAN BRUNY, SC 20174
Judicial District of New Haven

Murder; Evidence; Motion to Suppress In-Court and Out-of-Court Identifications as Unnecessarily Suggestive; Whether Trial Court Improperly Allowed Witnesses to Identify Defendant on Surveillance Video of Murder. The defendant and his associates were at a club in New Haven when they encountered another group of individuals that included the victim. One of the defendant's associates took a bottle and intentionally spilled it on the victim, which caused him and the others in his group to turn their attention away from the defendant while he positioned himself behind them. The associate then threw the bottle at the victim, and, at that time, the defendant stepped directly behind the victim and killed him by shooting him in the back of the head. The entire evening, including the murder, was captured on a video from the club's surveillance system, which was introduced into evidence at trial. The defendant filed a motion in limine to preclude the individuals that accompanied him to the club that night, as well as his foster mother, from identifying him on the surveillance video. He claimed that such testimony violated *State v. Finan* (275 Conn. 60), in which the Supreme Court held that opinion testimony that the defendant was the individual on a surveillance video committing the crime was improperly admitted because it went to the "ultimate issue" to be decided by the jury pursuant to § 7-3 of the Connecticut Code of Evidence. The trial court denied the defendant's motion, reasoning that the testimony did not run afoul of *Finan* so long as the witnesses did not identify the defendant on the video while he was committing the crime, and, at trial, the witnesses identified the defendant on the video at various times before and after the shooting. The defendant, also based on *Finan*, challenged the testimony of Anthony Imel, a forensic examiner, who analyzed the surveillance video at the request of Special Agent Jonathan Lauria. The court allowed Imel's testimony so long as he did not identify the defendant on the video while he was committing the crime. Imel testified that he created an "enhanced video" by manipulating the speed of the surveillance video and labeling certain individuals so that they could be tracked. The court allowed the enhanced video to be shown to the jury for purposes of demonstrating Imel's methodology but ordered that the labels identifying the individuals be removed from the time

when the bottle was thrown until one second after the shooting. On cross-examination, the defendant asked Imel about the notes that he had received from Lauria regarding the video, and the state, on redirect examination, elicited testimony that Lauria's notes stated that the defendant was the shooter on the video. The trial court overruled the defendant's objection to that testimony on the ground that, during cross-examination, he had "opened the door" to it by asking Imel about Lauria's notes. The defendant was convicted of murder and criminal possession of a pistol or revolver, and he appealed to the Supreme Court. On appeal, the defendant claims that the trial court erred by allowing the witnesses, including Imel, to identify him on the surveillance video. He also claims that the trial court improperly denied his motion to suppress the identifications made by Nigel Watts, who had been with the victim at the club. He argues that the circumstances surrounding Watts' identifications, although not the result of state action, were nonetheless unnecessarily suggestive, inadmissible under *State v. Holliman* (214 Conn. 38), and violated his right to due process. The defendant also makes claims regarding the trial court's failure to give a special credibility instruction and the sufficiency of the evidence to convict him of criminal possession of a pistol or revolver.

STATE *v.* DEONTE O. TOMLINSON, SC 20192
Judicial District of Fairfield

Criminal; Whether Admission of Expert Testimony Concerning Gang Activity Violated Evidentiary Rules and Defendant's Confrontation Clause Rights; Whether Certain Evidence of Gang Activity Constituted Inadmissible Hearsay; Whether Witnesses' Statements Properly Admitted Under Spontaneous Utterance Exception to Hearsay Doctrine. The defendant was convicted of murder and carrying a pistol without a permit in connection with the shooting death of Kahlil Diaz. The state's theory at trial was that the defendant and Diaz were members of rival gangs and that the defendant shot Diaz in retaliation for Diaz' murder of Ryan Hernandez, a member of the defendant's gang. In support of its theory, the state presented testimony from the gang intelligence sergeant for the Bridgeport Police Department, Jason Amato. Amato stated that he gathered intelligence on gangs and gang activity in the city from social media and contacts on the street. He claimed that he learned through his investigation that there was an ongoing conflict in the city between two gangs, the 150 and the Greene Hollow Boyz, arising out of the murder of Hernandez. He also learned that Hernandez was a member of the 150 gang,

and Diaz was a member of the Greene Hollow Boyz and had been acquitted of Hernandez' murder. In conjunction with Amato's testimony, the state introduced a YouTube video that featured the defendant and two other men singing rap music and contained images of a gun. Amato stated that there were several indicia of 150 gang affiliation in the video and interpreted the lyrics as vowing revenge on the individuals who killed Hernandez. On appeal, the defendant claims that the trial court's admission of Amato's expert testimony violated (1) the rules of evidence where it was improper because it lacked an adequate foundation and irrelevant because there was no direct evidence establishing the defendant's gang membership and (2) his sixth amendment confrontation clause rights because it included testimonial hearsay from Amato's informants and contacts on the street. The defendant also claims that the trial court improperly admitted other gang evidence that was irrelevant, prejudicial, and violated his right to a fair trial. He specifically challenges (1) the admission of the YouTube video as improper because it contained inadmissible hearsay, it lacked any nexus to the charged crimes and its prejudicial impact outweighed its probative value and (2) the admission of photographs of a mirror in the defendant's bedroom bearing the letters "DT," the number "150" and the word "GANG" on the ground that they constituted inadmissible hearsay. The defendant additionally claims that the trial court improperly admitted a recorded telephone call under the spontaneous utterance exception to the hearsay doctrine. During the call, which was recorded because it was made by an incarcerated individual, a witness to the crime stated that she had seen a tall, light skinned black male shoot Diaz. In response to the caller's question as to whether it was "DT," the witness in responded in the affirmative.

STATE *v.* COURTNEY G., SC 20290

Judicial District of New Haven

Criminal; Whether Trial Court Properly Admitted Evidence of Victim's Demeanor at Family Meeting; Whether Defendant's Right to a Fair Trial Violated by Prosecutorial Impropriety during Closing Argument; Whether Defendant's Right to be Present Violated by State's Invitation to Jury to Draw Adverse Inference of Guilt Based Defendant's Demeanor during Trial. The defendant filed this direct appeal to the Supreme Court under General Statutes § 51-199 (b) (3) from his conviction of sexual assault in the first degree and risk of injury to a minor in connection with the sexual abuse of the minor daughter of his former girlfriend. The defendant claims that

the trial court erred in permitting the state to introduce testimony by his former girlfriend that the victim cried during a family meeting called after the defendant made an inappropriate remark to the victim's cousin, arguing that this evidence was irrelevant and more prejudicial than probative. He takes the position that his former girlfriend was an improper constancy of accusation witness where he had not cross-examined the victim or questioned her delay in asserting her allegations and challenges the trial court's determination that his former girlfriend's testimony was admissible for the purpose of stating her observations of the victim's demeanor, to the extent they were relevant. The defendant also claims that the state advanced several improper arguments during closing argument that denied him his due process right to a fair trial. The defendant specifically argues that the prosecutor improperly appealed to the emotions of the jury, misstated the legal standard for reasonable doubt, improperly expressed her personal opinions, misled the jury as to what evidence it could consider, improperly vouched for the credibility of witnesses, and made statements that effectively diluted the state's burden of proof. The defendant's final claim on appeal is that his constitutional rights were violated by the state's invitation to the jury to draw an adverse inference of guilt based on his exercise of his right to be present. He specifies that this invitation was made in the context of a statement by the prosecutor during closing argument that the defendant had observed the trial testimony of his former girlfriend, the victim, and her cousin and that "there was a lack of outrage on his part." He argues that the statement improperly burdened and penalized his exercise of his sixth amendment right to be present at trial and improperly tied his exercise of his right to drawing an inference from his courtroom demeanor.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

continued . . .

CITY OF WATERBURY *v.* PURDUE
PHARMA, L.P., et al., SC 20311
CITY OF BRIDGEPORT et al. *v.* PURDUE
PHARMA, L.P., et al., SC 20312
CITY OF NEW HAVEN *v.* PURDUE
PHARMA, L.P., et al.; CITY OF NEW BRITAIN *v.*
PURDUE PHARMA, L.P., et al., SC 20313
Judicial District of Hartford

Standing; Municipalities; Pharmaceutical Companies; Whether Plaintiff Municipalities Lack Standing to Sue Companies Manufacturing Opioids For Harms Suffered By Plaintiffs From Epidemic of Opioid Abuse and Addiction. The plaintiffs, several Connecticut municipalities, brought these actions against the defendants, several companies manufacturing and distributing prescription opioids, claiming that the defendants engaged in an illegal campaign to increase the market for prescription opioids by misrepresenting the highly addictive nature of these drugs, which in turn created a nationwide epidemic of opioid abuse and addiction. The plaintiffs claimed that the opioid addiction epidemic caused them to incur increased costs for, inter alia, police, criminal justice, addiction treatment, children and family services, and first responders. They asserted common law claims of public nuisance, fraud, misrepresentation and unjust enrichment and also alleged violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. The defendants moved to dismiss the actions for lack of subject matter jurisdiction, contending that the plaintiffs did not have standing to bring their claims under *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313 (2001). In that case, the plaintiffs, the city of Bridgeport and its mayor, brought suit against various firearm manufacturers, trade associations and retail sellers for the costs incurred by the city as a result of gun violence. The Supreme Court concluded that the plaintiffs in *Ganim* lacked standing because the harms they alleged were too indirect and remote and were derivative of the injuries to others. In the present case, relying on *Ganim*, the trial court granted the defendants' motions to dismiss, ruling that the plaintiffs lacked standing because their injuries were too remote and indirect from the defendants' alleged misconduct and were derivative of the harms suffered by opioid addicts, who were the direct victims of that alleged misconduct. The plaintiffs appeal from the dismissal and claim that *Ganim* is distinguishable from the present case. They argue that, unlike the plaintiffs in *Ganim*, they have alleged direct injuries proximately caused by the defendants' unlawful and fraudulent scheme to increase the market for highly

addictive opioid drugs—the foreseeable and inevitable catastrophic increase in the number of opioid addicts in their communities; a host of concomitant ills, such as illegal drug markets and overdose deaths; and increased demands on both social and criminal justice services provided by the plaintiffs. The plaintiffs further contend that the harms for which they seek recovery are not derivative of harms suffered by opioid addicts where the creation of an unprecedented “cohort” of drug addicts places burdens on the community separate and apart from the harm suffered by the addicts themselves. Additionally, the plaintiffs argue that *Ganim* is distinguishable because, unlike the present case, there were no allegations in *Ganim* that the defendants had engaged in an intentional wrongful scheme to increase the market for their product.

STATE *v.* BROCK DAVIS, SC 20335
Judicial District of Hartford

Criminal; Right to Counsel; Whether the Trial Court Properly Denied the Defendant’s Motions to Dismiss his Attorney; Whether the Defendant’s Right to Counsel was Violated When the Trial Court Failed to Inquire About an Alleged Conflict of Interest Between the Defendant and his Attorney; Whether the Trial Court Properly Allowed Three Lay Witnesses to Testify that the Defendant was the Person on a Surveillance Videotape. The defendant was charged with murder in connection with the stabbing death of a man on a street in Hartford. A surveillance camera recorded the incident. At a pretrial hearing, the defendant told the trial court that he no longer wanted his court-appointed attorney to represent him, claiming that she failed to provide him with certain discovery materials, that she had tried to convince him to accept the state’s plea deal, and that she had suggested that he is guilty. The trial court told the defendant that those were not grounds for removal of his attorney and that he should file a written motion to dismiss his attorney. The defendant subsequently filed a motion to dismiss his attorney, claiming that she failed to perform her responsibilities as an attorney, that she refused to provide him access to relevant materials, that she failed to investigate information that he had provided to her, and that there was a conflict of interest. The trial court held a hearing during which the defendant claimed that it took a year for his attorney to get him certain materials and that he did not believe his attorney was being honest with him. During the hearing, neither the court nor the defendant addressed his claim that there was a conflict of interest.

The trial court denied the motion, and the defendant was represented by his court-appointed attorney at trial. At trial, three lay witnesses testified that the defendant was the individual on the surveillance video, and the jury found the defendant guilty. At his sentencing, the defendant told the trial court that he had moved to dismiss his attorney prior to trial because his attorney also was representing the victim's son in an unrelated case. The court did not inquire further, and the defendant appealed, claiming that his constitutional right to conflict-free representation of counsel was violated when the trial court denied his motions to dismiss his attorney without conducting an adequate inquiry into the grounds for his motions and when it failed to inquire about the alleged conflict of interest between the defendant and his attorney. The defendant also claims that the trial court erred in allowing three lay witnesses to testify that the defendant was the person on a surveillance videotape because that was the ultimate issue in the case.

DEBRA COHEN *v.* STATEWIDE GRIEVANCE COMMITTEE, SC 20356
Judicial District of Hartford

Attorney Discipline; Rules of Professional Conduct; Whether Rule Prohibiting a Lawyer From Making “False Statement” To Tribunal Only Applies When Lawyer Is Representing a Client; Whether Plaintiff Attorney Made a Knowingly False Statement To Probate Court. The plaintiff was hired as a staff attorney for the Office of the Probate Court Administrator in 2005. At the time, she was serving as the trustee for the sole beneficiary of an estate. In May, 2012, the plaintiff submitted a final accounting for the estate that included a claim for fiduciary fees. She subsequently filed an amended accounting after she informed the chief clerk of the Probate Court that she would not be requesting any fiduciary fees therein. The Probate Court returned the accounting to the plaintiff, accompanied by a letter stating that the plaintiff had improperly reduced her contribution for the tax interest and penalties incurred by the estate due to her failure to file timely tax returns and noting that she had waived her fiduciary fees. On June 24, 2013, the plaintiff filed an amended final account that reflected her contribution of \$5531.84 to the estate but also included fiduciary fees in a corresponding amount of \$5531.84. Upon learning that the Probate Court had concerns regarding the accounting, the plaintiff revised it to remove the claim for fiduciary fees, which the Probate Court approved. The Chief Disciplinary Counsel filed a grievance complaint against the plaintiff, and the defendant's reviewing committee found that the plaintiff's request for fiduciary fees in the

June 24, 2013 amended final account constituted (1) a knowingly “false statement . . . to a tribunal” in violation of rule 3.3 (a) (1) of the Rules of Professional Conduct (RPC) and (2) dishonest conduct in violation of rule 8.4 (3) of the RPC. Thereafter, the defendant affirmed that decision, and the plaintiff appealed to the trial court, which dismissed the appeal. The plaintiff appealed, claiming that rule 3.3 (a) (1) did not apply to attorneys in a fiduciary role but rather only to attorneys acting in the course of an attorney-client relationship. The Appellate Court (189 Conn. App. 643) disagreed, noting that the text of rule 3.3 does not contain language providing for such limitation and stating that the text was authoritative. It further determined that it would not import language into the rule to restrict its application to attorney-client relationships. The court also rejected the plaintiff’s claim that her request for fiduciary fees could not be deemed to be a misstatement or dishonest because she performed services as the fiduciary for the estate. It noted that the plaintiff was found to have violated rules 3.3 (a) (1) and 8.4 (3) because her request for fiduciary fees in the June 24, 2013 amended final account was inconsistent with her prior representations to the Probate Court, not because she did not render fiduciary services. The trial court’s judgment was therefore affirmed. The plaintiff was granted certification to appeal, and the Supreme Court will determine whether the Appellate Court correctly concluded (1) that rule 3.3, which provides that “[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal,” applies when the lawyer makes the statement while acting in a capacity other than as a lawyer representing a client and (2) that the entry for fiduciary fees made by the plaintiff in the amended final accounting constituted a knowingly false statement within the meaning of rules 3.3 (a) (1) and 8.4 (3).

ONE ELMCROFT STAMFORD, LLC *v.* ZONING BOARD OF APPEALS
OF THE CITY OF STAMFORD et al., SC 20393
Judicial District of Stamford-Norwalk at Stamford

Statutory Interpretation; Whether Appellate Court Correctly Concluded that General Statutes § 14-55 was Not Repealed in 2003. In June, 2016, the defendant Pasquale Pisano filed for a used car dealer license from the Department of Motor Vehicles. Pursuant to General Statutes § 14-54, the license required a “certification of approval of the location” from the appropriate local board, and Pisano accordingly filed an application with the defendant Zoning Board of Appeals of the city of Stamford to locate the defendant used car

business Pisano Brothers Automotive, Inc, at 86 Elmcroft Road in Stamford. The board approved the application with conditions, and the plaintiff, which owns abutting property at 126 Elmcroft Road, filed an administrative appeal from the board's decision to the trial court, which denied the appeal. The plaintiff thereafter appealed to the Appellate Court (192 Conn. App. 275), which reversed the trial court's judgment. The Appellate Court agreed with the plaintiff's claim that the trial court improperly upheld the board's decision despite the board's failure to review the application in accordance with General Statutes § 14-55 and its suitability criteria. General Statutes § 14-55 establishes the procedure for a municipal authority to consider an application for a certificate of approval filed under § 14-54 and provides in relevant part that, before approving the application, the authority must have found that the location was suitable for the intended business with "due consideration to its location in reference to schools, churches, theatres, traffic conditions, width of highway and effect on public travel." The plaintiff noted that published editions of the General Statutes have stated that § 14-55 has been repealed but argued that the statute in actuality has not been repealed. The Appellate Court concurred. It observed that Public Acts 2003, No. 03-184, § 10 purported to repeal the statute as of October 1, 2003, but that the subsequently passed Public Acts 2003, No 03-265 purported to repeal but then replace the statute, also as of October 1, 2003. In concluding that § 14-55 had not been repealed, the Appellate Court cited to General Statutes § 2-30b (a), which provides in relevant part that when multiple acts pertaining to the same statute are passed in the same legislative session and are in "irreconcilable conflict . . . the act which was passed last . . . shall be deemed to have repealed the irreconcilable provision contained in the earlier act." The Appellate Court determined that the two public acts were in irreconcilable conflict and that because Public Act 03-265 had been enacted last, it set forth the operative version of the statute. The Appellate Court then held that the board had erroneously treated the application as one for a variance rather than a certificate of approval and had therefore failed to give due consideration to the suitability factors laid out in § 14-55 as amended by Public Act 03-265, despite the defendants' arguments to the contrary. The defendants Pisano and Pisano Brothers Automotive, Inc. have been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that General Statutes § 14-55 was not repealed in 2003.

BOARDWALK REALTY ASSOCIATES, LLC *v.* M & S GATEWAY
ASSOCIATES, LLC, ET AL., SC 20395
Judicial District of Hartford

Receiver of Rents; Whether Trial Court Correctly Held That Receiver of Rents Appointed under § 12-163a is Not Authorized to Collect Rent or Use and Occupancy Payments from Occupants of Property When Owner of Property is Not Charging Rent. Since 1995, the defendants have owned and operate an automobile dealership at a rental property in Canton (the property) pursuant to a lease agreement. In the late 1990's, it was discovered that the property is environmentally contaminated, and the property owner abandoned the property shortly before the defendants' lease expired in 2001. The defendants thereafter continued to operate the dealership at the property without making any payments to the owner. In 2011, the town of Canton filed a petition under General Statutes § 12-163a seeking the appointment of a receiver of rents for the property after the property owner failed to pay real property taxes that it owed to the town. Under § 12-163a, a municipality may seek the appointment of a receiver to collect rents from a property that is subject to delinquent property taxes, and "[t]he receiver appointed by the court shall collect all rents or payments for use and occupancy forthcoming from the occupants of the building in question in place of the owner" The trial court appointed the plaintiff receiver of rents for the property, and the plaintiff brought this action against the defendants seeking damages for past due rent and/or use and occupancy. The plaintiff moved for summary judgment as to liability, arguing that the defendants, as tenants or occupants of the property, are obligated to pay rent or make payments for use and occupancy. The defendants objected and also moved for summary judgment, arguing that no rent or payments are due because it does not have an agreement with the owner to pay any rent or payments for use and occupancy. The trial court granted the defendants' motion for summary judgment, concluding that there is no rent for the plaintiff to collect because the property owner, by abandoning the property, had allowed the defendants to occupy the property without a rental obligation. The court emphasized that the expired lease agreement did not include a holdover provision that would have established the defendants' status after the lease had expired. The plaintiff appeals, and the Supreme Court will decide whether the trial court correctly held that a receiver of rents appointed under § 12-163a is prohibited from collecting rent or payments for use and occupancy from an occupant when the owner is not seeking payments from the occupant.

STATE *v.* VICTOR M. ALICEA, SC 20399

Judicial District of Windham G. A. 11 at Danielson

Criminal; Inconsistent Verdicts; Whether the Defendant’s Convictions of Intentional Assault in the First Degree and Reckless Assault in the First Degree were Inconsistent. During an altercation with the victim, the defendant cut the victim’s neck with a razor blade. The victim was transported to a hospital where he underwent surgery to repair his lacerated neck muscle and his left external jugular vein. The defendant was charged with one count of intentional assault in violation of General Statutes § 53a-59 (a) (1) and one count of reckless assault in violation of § 53a-59 (a) (3). Section 53a-59 provides in relevant part: “(a) A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person . . . by means of a deadly weapon or a dangerous instrument . . . or (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person” The jury found the defendant guilty of both intentional and reckless assault, and the defendant appealed, claiming that the jury’s verdicts of guilty of both intentional and reckless assault were legally inconsistent because the single act against the victim could not have been both intentional and reckless. The Appellate Court (191 Conn. App. 421) rejected his claim, finding that the Supreme Court’s decision in *State v. Nash*, 316 Conn. 651, 660–61 (2015), is controlling. In *Nash*, the Supreme Court held that the defendant’s convictions for intentional and reckless assault in the first degree were not legally inconsistent because the two mental states required to commit the offenses—“intent to cause serious physical injury” and “recklessly engag[ing] in conduct which creates a risk of death”—relate to different results. Here, the Appellate Court reasoned that the jury’s finding that the defendant recklessly engaged in conduct that created a grave risk of death and that caused serious physical injury to the victim (reckless assault) was not inconsistent with its finding that the defendant also intended to seriously injure the victim (intentional assault). The defendant has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the jury’s verdicts of guilty of intentional assault and reckless assault were not legally inconsistent. The defendant argues that *Nash* is distinguishable because he caused a single injury to a single victim with a single act and that insofar as *Nash* allows for multiple convictions in the absence of multiple acts or multiple victims, it should be overruled.

STATE *v.* JAMES HENRY WATSON, SC 20400
Judicial District of Fairfield

Criminal; Whether Supreme Court Should Overrule *State v. Morales*, Where Appellate Court Held that Trial Court’s Postverdict Determination of Whether Strangulation, Unlawful Restraint and Assault Occurred “Upon the Same Incident” under General Statutes § 53a-64bb (b) Does Not Violate Right to a Fair Trial. The defendant and the victim were “hanging out” in front of the defendant’s apartment building when the victim said that she needed to use the bathroom. The defendant took the victim to his apartment, and she went into the bathroom. When she tried to exit, however, the defendant blocked the door. He eventually allowed her to leave the bathroom but blocked her access to the front door. Over the course of the next several hours, the defendant struck and choked the victim and prevented her from leaving the apartment by refusing to return her cell phones and grabbing the hood of her sweatshirt when she attempted to run to the front door. The victim eventually convinced the defendant to let her leave the apartment, and while she was walking away, she waved down a passing ambulance and told the paramedics about the incident. The police were contacted, and after they spoke to the victim and the defendant, they arrested the defendant and charged him with, inter alia, assault in the third degree in violation of General Statutes § 53a-61, unlawful restraint in the first degree in violation of General Statutes § 53-95 (a), and strangulation in the second degree in violation of General Statutes § 53a-64bb. The matter was tried to a jury, which found the defendant guilty of the crimes. The defendant filed a motion for a judgment of acquittal as to the assault and unlawful restraint charges and argued that they were “upon the same incident” as the strangulation charge for purposes of § 53a-64bb (b). That subsection provides in relevant part: “No person shall be found guilty of strangulation in the second degree and unlawful restraint or assault upon the same incident, but such person may be charged and prosecuted for all three offenses upon the same information.” The trial court denied the motion, and the defendant was sentenced. He appealed, and the Appellate Court (192 Conn. App. 353) affirmed his conviction. The defendant claimed that the issue of whether the crimes were “upon the same incident” under § 53a-64bb (b) was improperly determined by the trial court because it should have been submitted to the jury. The Appellate Court disagreed and noted that the claim was governed by *State v. Morales*, 164 Conn. App. 143, cert. denied, 321 Conn. 916 (2016). In *Morales*, the court rejected the defendant’s claim that the trial court’s factual findings as to whether

his convictions of strangulation, unlawful restraint, and assault were “upon the same incident” under § 53a-64bb (b) violated the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.” The court in *Morales* concluded that the trial court did not violate *Apprendi* because it had simply looked at the evidence and concluded that it supported the jury’s verdict on each charge. The Appellate Court here thus denied the aforementioned claim, as well as the defendant’s other claims alleging violations of his double jeopardy and confrontation clause rights. The Supreme Court will decide in this certified appeal by the defendant whether it should overrule *Morales*.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
SUBSTITUTED BY MANUFACTURERS AND TRADERS TRUST
COMPANY *v.* ROBERT J. VIRGULAK et al., SC 20403
Judicial District of Stamford-Norwalk at Stamford

Foreclosure; Whether Trial Court Properly Declined to Reform Mortgage to Reference that Mortgage Executed by Defendant was Given to Secure Note Executed by Her Husband; If So, Whether Trial Court Properly Determined that Plaintiff was Not Entitled to Foreclosure on Mortgage. On December 11, 2006, Robert Virgulak executed and delivered a note to JPMorgan Chase Bank, National Association for a loan of \$533,000 (note). His wife, Theresa Virgulak (defendant), was not a signatory on the note. On the same day, the defendant signed a mortgage deed for property in Norwalk (mortgage) stating that it was given to secure a note dated December 11, 2006 and that the note was signed by the defendant as “borrower” for \$533,000. The mortgage did not reference Robert Virgulak. After the note went into default, JPMorgan commenced this action against the Virgulaks to foreclose on the mortgage. This action was later withdrawn as to Robert Virgulak. The plaintiff amended its complaint to seek both foreclosure and an equitable reformation of the mortgage to reference that it was executed to secure the note. The matter was tried to the trial court, which found in favor of the defendant on the foreclosure and reformation counts. The trial court concluded that the plaintiff had failed to sustain its burden of proving that it was entitled to reformation and that it further had failed to present any authority that would allow it to prevail on its foreclosure claim in the absence of a reformation of the mortgage. Manufacturers and Traders Trust Company, which had been substituted as plaintiff, appealed, and the Appellate Court (192 Conn. App. 688) affirmed the

trial court's judgment. The Appellate Court rejected the plaintiff's claim that the trial court had erred by refusing to exercise its discretion in considering the foreclosure claim as independent from the reformation claim. The Appellate Court observed that there was no dispute that the defendant did not sign the note and that the mortgage did not purport to secure the note but rather identified the defendant as the borrower on the note. It accordingly concluded that reformation was a necessary prerequisite because, in the absence thereof, the plaintiff could not prevail on its claim that foreclosure was warranted on the ground that the mortgage was intended to secure the note where the mortgage, as executed, was a nullity that secured a nonexistent debt. The Appellate Court also rejected the plaintiff's claim that the trial court abused its discretion in declining to reform the mortgage where the plaintiff had failed to proffer sufficient evidence that the parties had made a mutual mistake regarding the intent of the mortgage to secure the note. The plaintiff has been granted certification to appeal. The Supreme Court will decide (1) whether the Appellate Court properly upheld the trial court's decision declining the plaintiff's request to reform the mortgage deed to reference that the mortgage executed by the defendant was given to secure a note executed by her husband, and if so, (2) whether the Appellate Court properly upheld the trial court's determination that the plaintiff was not entitled to foreclose the mortgage executed by the defendant because the defendant was not a borrower on the note.

EUGENE ROBERTO *v.* BOEHRINGER INGELHEIM
PHARMACEUTICALS, INC., et al., SC 20409
CHARLES F. ADKINS *v.* BOEHRINGER INGELHEIM
PHARMACEUTICALS, INC., et al., SC 20467
Judicial District of Hartford

Product Liability; Federal Preemption; Whether Trial Court Properly Determined that Federal Law Preempts Plaintiffs' Failure to Warn Claims; Whether Trial Court Properly Denied Defendants' Motion for a New Trial. The plaintiffs, Eugene Roberto and Charles Adkins, took Pradaxa, a prescription blood thinner manufactured by the defendants, to lower their risk of having a stroke caused by atrial fibrillation. Each plaintiff experienced gastrointestinal bleeding and subsequently brought a product liability action against the defendants, claiming that Pradaxa's label failed to include an adequate warning about the need to monitor patients' blood levels. Roberto also claimed that the label failed to warn about an increased risk of

uncontrolled bleeding in patients with gastroesophageal reflux disease (GERD). Roberto's case was tried to a jury, which found for the plaintiff. The jury awarded \$542,464 in compensatory damages and also determined that punitive damages were warranted. The defendants moved for judgment notwithstanding the verdict or a new trial, claiming that the evidence was insufficient to support the jury's verdict and that the plaintiff's failure to warn claims were preempted under the "impossibility" doctrine, which provides for implied federal preemption when it is impossible for a party to comply with both state and federal law. Here, the defendants argued that it was impossible for them to comply with the state law claim that they should have included additional warnings on the label because there was no newly acquired information that would have allowed them to change the label without prior approval from the Food and Drug Administration. The trial court concluded that Roberto's claim that the defendants failed to warn about the need for blood monitoring was preempted because there was no newly acquired information to support such a change to the label. The court also found, however, that the plaintiff's GERD claim was not preempted where the European label for Pradaxa, which included a warning regarding an increased risk of bleeding in patients with GERD, constituted new information. Accordingly, the court denied the defendants' motion and awarded Roberto \$1 in punitive damages. Roberto appealed, and the defendants cross appealed. Thereafter, the trial court rendered summary judgment for the defendants in Adkins' case, concluding that Adkins' failure to warn claim regarding blood level monitoring was preempted under the impossibility doctrine. Adkins appealed, and his appeal was consolidated with Roberto's appeal and the defendants' cross appeal. In these consolidated appeals, the Supreme Court will decide whether the trial court properly determined that the plaintiffs' failure to warn claims were preempted under the impossibility doctrine. In their cross appeal, the defendants claim that Roberto failed to introduce sufficient evidence of causation to support the jury's verdict and that they are entitled to a new trial on Roberto's GERD claim because certain evidence regarding his blood monitoring claim should not have been presented to the jury in light of the trial court's finding that the claim was preempted.

DELORES PEEK *v.* MANCHESTER MEMORIAL HOSPITAL et al.,
SC 20414

Judicial District of Hartford

Negligence; Statute of Limitations; Whether Appellate Court Properly Concluded that Plaintiff Raised a Genuine Issue of Material Fact as to When Statute of Limitations Commenced. The plaintiff was admitted to the defendant hospital for treatment of a bacterial infection. She was evaluated at the time of her admission and determined to be a fall risk. As a result, she was placed on “fall prevention protocol” and required assistance whenever she left her hospital bed. On February 10, 2015, the plaintiff attempted to summon staff so that she could use the bathroom, but, when no one came, she left the bed on her own. She subsequently fell in the bathroom and sustained injuries. On November 22, 2016, the plaintiff received an automatic ninety-day extension of the statute of limitations pursuant to General Statutes § 52-190a (b), and, on May 22, 2017, she delivered the writ of summons and complaint to the state marshal for service of process. The defendants moved for summary judgment on the ground that the plaintiff’s action was barred by the applicable statute of limitations, General Statutes § 52-584, which provides that a negligence action against a hospital “shall be brought . . . within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered.” The plaintiff filed an objection along with an affidavit averring that, on February 10, she did not know what caused her fall. The affidavit went on to state that, on April 6, 2015, the plaintiff learned from her doctor that she was subject to the fall risk protocol and that the hospital was required to provide her with assistance whenever she left her bed. She claimed that the statute of limitations therefore began to run when she learned these facts on April 6, 2015. The trial court disagreed and concluded that the limitations period began to run when the plaintiff fell on February 10, 2015, and expired on May 10, 2017, twelve days prior to when this action was commenced. As a result, the court granted the defendants’ motion for summary judgment, and the plaintiff appealed to the Appellate Court (193 Conn. App. 337). The Appellate Court explained that the statute of limitations begins to run when the plaintiff suffers “actionable harm,” meaning the plaintiff discovers or reasonably should have discovered the essential elements of a cause of action in negligence, which includes that the harm complained of was caused by the defendant. The court found that the plaintiff’s affidavit adequately countered the defendants’ motion with admissible evidence demonstrating a genuine issue of material fact as to when

she discovered the alleged breach of a duty by the defendants and a causal nexus between that breach and the resulting harm. The Appellate Court found that, because the plaintiff raised a genuine issue of material fact, the trial court erred in granting the defendants' motion for summary judgment and, therefore, that court reversed the judgment of the trial court. Following the granting of certification, the defendants appealed to the Supreme Court. They claim that the Appellate Court improperly concluded that there was a genuine issue of material fact as to when the plaintiff discovered actionable harm, as she had sufficient knowledge on the date of her fall to bring a negligence action. The defendants argue that what the plaintiff learned during her April 6 doctor's appointment was "immaterial" because it only informed what "legal theory" the plaintiff could pursue.

TOWN OF LEDYARD *v.* WMS GAMING, INC., SC 20418
Judicial District of New London

Taxation; Statutory Interpretation; Standard for Awarding Municipality Attorney's Fees to Recover Unpaid Taxes Under General Statutes § 12-161a; Whether Appellate Court Properly Concluded that Trial Court Erred in Interpreting § 12-161a. In June, 2008, the plaintiff town brought this action pursuant to General Statutes § 12-161a to collect unpaid personal property taxes from the defendant. The unpaid taxes were levied on slot machines that the defendant leased to the Mashantucket Pequot Tribal Nation (Tribal Nation) for use in its casino located in the plaintiff town. In August, 2006, two years prior to the commencement of this action, the Tribal Nation brought a District Court action against the plaintiff, claiming that its authority to impose personal property taxes on certain slot machines owned by a different corporation was preempted by federal law. Shortly after the plaintiff filed this action, the Tribal Nation filed a second federal action against the plaintiff asserting the same claim with respect to the defendant's unpaid taxes. Those two actions were consolidated, and this action was stayed pending their resolution. After the District Court found that the taxes were preempted, the plaintiff appealed to the United States Court of Appeals for the Second Circuit, which reversed the judgment of the District Court and concluded that federal law did not preempt the plaintiff from levying the taxes at issue. After that decision, the stay in this action was lifted, and the parties filed a stipulation with the trial court providing that the defendant had tendered all outstanding taxes, interest, and penalties and that the plaintiff was entitled to reasonable attorney's fees. The parties disputed, however, whether the plaintiff could recover the attorney's

fees it had incurred in defending the consolidated federal action under § 12-161a, and they filed cross motions for summary judgment as to liability with respect to those fees. The trial court rendered summary judgment in favor of the plaintiff, finding that the attorney's fees in question "were directly related to and a result of the [plaintiff's tax] collection proceedings." The defendant appealed from that decision to the Appellate Court (171 Conn. App. 624), which dismissed the appeal for lack of a final judgment, and the Supreme Court (330 Conn. 75) reversed that determination and remanded the matter to the Appellate Court for further proceedings. On remand, the defendant argued that the trial court had wrongly concluded that the attorney's fees incurred by the plaintiffs in defending the federal action were "as a result of and directly related to" this action under § 12-161a. The Appellate Court (192 Conn. App. 836) found that the trial court had improperly applied an expansive interpretation of the statute and reasoned that, because the fees must be "directly related to" the tax collection proceeding, § 12-161a required a more restrictive proximal nexus between that proceeding and the requested fees. After examining the claims advanced in the federal action, the Appellate Court determined that the attorney's fees could not be recovered under § 12-161a because they were not "directly related to" an action that would result in a final determination of the parties' rights and obligations relative to the claimed delinquent tax. In this certified appeal to the Supreme Court, the plaintiff claims that the Appellate Court erred in determining that the plain meaning of § 12-161a did not authorize the trial court to award the attorney's fees in question, proposing that the statute only requires that the requested fees be proximately caused by the tax collection proceeding.

ELVIRA GONZALEZ et al. v. O&G INDUSTRIES, INC., et al., SC 20422
Judicial District of Hartford

Torts; Negligence; Strict Liability; Whether "Gas Blow" Procedure is Ultra-Hazardous Activity for Which Strict Liability Applies; Whether Owner of Construction Site Exercised Control over Gas Blow Giving Rise to Duty to Injured Plaintiffs. On February 7, 2010, an explosion occurred at a power plant construction site in Middletown that killed six people and injured over fifty others. The explosion happened while workers were cleaning debris from the natural gas pipe lines using highly pressurized natural gas in a process known as a "gas blow." The plaintiffs brought this action against, among others, the owner of the power plant, Kleen Energy Systems, LLC (Kleen Energy), and its project manager, Power Plant Management

Services, LLC, seeking to recover for the injuries that they sustained while working on the site at the time of the explosion. The trial court rejected the plaintiffs' claim that a gas blow is an ultra-hazardous activity for which the defendants may be held strictly liable. The trial court recognized that any harm from a gas blow would likely be significant, that the procedure was not commonly used and that the value of the procedure to the community does not outweigh the dangerous attributes. The trial court determined, however, that those factors are outweighed by the fact that a gas blow involves a low risk of injury to persons or property of others when performed correctly and with due care in the proper setting. The trial court then rendered summary judgment on the negligence claims in favor of the defendants, finding that they owed no duty to the plaintiffs because they did not exercise any control over the gas blow. The trial court found that the contract between Kleen Energy and its general contractor, O&G Industries, Inc. (O&G), plainly gave O&G full control of the building of the power plant and responsibility for safety on the site. The trial court further found that there was nothing in the record that would support a conclusion that anything that the defendants did, or did not do, was a substantial contributing factor in causing the explosion. The plaintiffs appeal, claiming that the trial court improperly found that a gas blow is not an ultra-hazardous activity for which strict liability applies. The plaintiffs further argue that, even if a gas blow falls short of qualifying as an ultra-hazardous activity subject to strict liability, it constitutes an inherently dangerous activity for which the defendants may be held liable for their negligent failure to take preventative measures. The plaintiffs also claim that the trial court improperly rendered summary judgment in favor of the defendants on the negligence counts because triable issues of fact exist as to whether the defendants exercised any control over the gas blow and as to whether direct negligence by the defendants caused the explosion.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE,
ON BEHALF OF THE HOLDERS OF THE ADJUSTABLE
RATE MORTGAGE TRUST 2007-1, ADJUSTABLE
RATE MORTGAGE-BACKED PASS-THROUGH
CERTIFICATES, SERIES 2007-1 *v.* CAROL J.
ROTHERMEL, SC 20463
Judicial District of Stamford-Norwalk at Stamford

**Foreclosure; Mootness; Whether Appellate Court Properly
Dismissed as Moot Defendant's Appeal from Denial of Motion**

to Open Strict Foreclosure Judgment Filed One Day after Title Had Vested in Plaintiff; If Not, Whether Trial Court Properly Denied Defendant’s Motion to Open Strict Foreclosure Judgment. In 2013, the plaintiff initiated this foreclosure action against the defendant with respect to her property in New Canaan. In 2014, the trial court granted the plaintiff’s motion for a judgment of strict foreclosure. Over the course of the next several years, the judgment was opened and the law day was extended multiple times as the parties engaged in negotiations between themselves to resolve the dispute outside of the foreclosure process. On February 5, 2019, the plaintiff filed a motion to open the judgment and extend the law day, and the trial court granted the motion, extending the law day to March 12, 2019, for the defendant as the owner of the equity of redemption. The law day passed without redemption by the defendant, and title to the property vested in the plaintiff. On the following day, the defendant filed a motion to open the judgment and extend the law day, claiming that she had relied on communications from the loan servicer that the foreclosure would be held in abeyance pending receipt of a short payoff agreement and that the “foreclosure sale” would occur on March 13, 2019. The plaintiff argued in objection that the trial court lacked jurisdiction to open the judgment under General Statutes § 49-15 (a), which provides in relevant part that “no judgment [of strict foreclosure] shall be opened after title has become absolute in any encumbrancer” except as provided under another part of the statute that is inapplicable here. The trial court agreed with the plaintiff and denied the defendant’s motion to open. It rejected the plaintiff’s argument that it had the authority to open the judgment notwithstanding § 49-15 (a) under *Wells Fargo Bank, N.A. v. Melahn*, 148 Conn. App. 1 (2014), where the Appellate Court held that the trial court had jurisdiction and authority to consider the defendant’s motion to open the judgment of strict foreclosure filed after the passing of the law day and should have granted it where the plaintiff had not complied with the terms of the judgment. The trial court determined that *Melahn* was distinguishable and that similar equitable concerns were not present here. The defendant appealed from the trial court’s denial of her motion to open to the Appellate Court, and the plaintiff filed a motion to dismiss the appeal on the ground that it was moot because the Appellate Court could not afford practical relief to the defendant where title to the property had vested in the plaintiff. The Appellate Court granted the motion to dismiss. The defendant has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly dismissed the defendant’s appeal as moot, and if not, whether the trial court properly denied the defendant’s motion to open.

VIKING CONSTRUCTION, INC. *v.* TMP CONSTRUCTION
GROUP, LLC, SC 20484
Judicial District of Fairfield

Breach of Contract; Partial Performance; Damages; Whether Trial Court Properly Concluded That Reasonable Jury Could Award Cost of Repair Damages. The plaintiff was the general contractor on a project to build an apartment complex and entered into a \$1.5 million subcontract with the defendant to perform the drywall work. In May, 2017, the defendant stopped working when the project was partially complete. The plaintiff requested that the defendant complete the project, informing the defendant that, if it refused, the plaintiff would retain the \$350,685.66 that remained due under the subcontract and seek to recover additional damages. The defendant refused to return to work, and the plaintiff hired another subcontractor to complete the project and to repair certain work previously done by the defendant. The plaintiff thereafter commenced this action, and the matter was tried to a jury, which returned a verdict in favor of the plaintiff on its breach of contract claim. The jury awarded the plaintiff \$45,373.88 in damages, which was the exact amount that it cost to repair the work that the defendant had completed. The defendant moved to set aside the verdict claiming, *inter alia*, that the trial court improperly instructed the jury with respect to damages. The defendant argued that the plaintiff could not recover more than the amount due under the contract because the plaintiff claimed that the defendant breached the section of the contract stating that, if the defendant did not complete the project, the plaintiff could finish the work and “deduct the cost thereof, together with all loss or damage occasioned thereby, from any money then due or thereafter to become due to the [defendant] under this [a]greement.” According to the defendant, the plaintiff could only recover more than the amount due if it had terminated the contract, which the parties agreed the plaintiff had not done. The trial court denied the motion to set aside the verdict after finding that a reasonable jury could have awarded the cost to repair damages under various sections of the contract. The court specifically relied on the election of remedies section, which provided that, in addition to retaining the amounts due, the plaintiff “may sue [the defendant] and recover damages.” It also relied on the sections that provided, despite making monthly installments payments, the plaintiff retained the right to reject the defendant’s work and make repairs, and “the cost and expense thereof . . . shall be paid by [the defendant].” The trial court concluded that it properly instructed the jury regarding damages and rendered judgment in accordance with the jury’s verdict. The defendant

appealed to the Appellate Court, and the Supreme Court transferred the appeal to itself. The defendant claims that the trial court erred because the plaintiff did not base its breach of contract claim on the sections upon which the court relied in denying the motion to set aside the verdict, and, if it had, the plaintiff failed to comply with those sections by giving the defendant proper notice of the defective work and an opportunity to cure the defects. Furthermore, the defendant claims that the trial court improperly rejected its claim to dismiss this action because, for the reasons already stated, there was no practical relief available to the plaintiff because it could only retain the amounts due, which it had done.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

*Jessie Opinion
Deputy Chief Staff Attorney*
